

1 Scott D. Baker (SBN 84923)
2 Ashley L. Shively (SBN 264912)
3 REED SMITH LLP
4 101 Second Street
5 Suite 1800
6 San Francisco, CA 94105-3659
7 Telephone: 415-543-8700
8 Fax: 415-391-8269
9 sbaker@reedsmith.com
10 ashively@reedsmith.com

11 *Attorneys for Defendant*
12 *PNC Bank, National Association*

13 [Additional Counsel Listed on Signature Pages]

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

17 B & R SUPERMARKET, INC., d/b/a MILAM'S
18 MARKET, a Florida corporation; and GROVE
19 LIQUORS LLC, a Florida limited liability
20 company, individually and on behalf of all other
21 similarly situated,

22 Plaintiffs,

23 vs.

24 VISA, INC., a Delaware corporation, et al.

25 Defendants.

Case No. 3:16-cv-01150-WHA

**NOTICE OF MOTION, MOTION OF THE
SIX BANK DEFENDANTS - BARCLAYS
BANK DELAWARE, CAPITAL ONE
FINANCIAL CORPORATION, CITIBANK,
N.A. FOR ITSELF, AND AS SUCCESSOR
IN INTEREST TO CITIBANK (SOUTH
DAKOTA), PNC BANK, NATIONAL
ASSOCIATION, USAA SAVINGS BANK
AND WELLS FARGO BANK, N.A. - TO
DISMISS PLAINTIFFS' COMPLAINT, AND
MEMORANDUM OF LAW IN SUPPORT**

Date: June 2, 2016

Time: 8:00 am

Courtroom: 8

Judge: The Honorable William Alsup

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on June 2, at 8 a.m. in the courtroom of the Honorable
3 William Alsup, United States District Court for the Northern District of California, 450 Golden Gate
4 Ave., Courtroom 8, 19th Floor, San Francisco, California, Defendants Barclays Bank Delaware,
5 Capital One Financial Corporation , Citibank, N.A. for itself, and as successor in interest to Citibank
6 (South Dakota), N.A., PNC Bank, National Association, USAA Savings Bank and Wells Fargo
7 Bank, N.A. (collectively, the “Six Banks”) will, and hereby do, move to dismiss Plaintiffs’
8 Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

9 With this motion, the Six Banks seek an order from the Court dismissing with prejudice
10 Plaintiffs’ Complaint as to the Six Banks.

11 This motion is based on this Notice of Motion and Motion, the Memorandum of Law in
12 support thereof, the documents on file with the Court, and such further evidence and argument as the
13 Court may permit.

14 The Six Banks also join in the Joint Motion of all Defendants to Dismiss the Plaintiffs’
15 Complaint filed April 18, 2016 (the “Joint Motion”) and adopt and incorporate by reference into
16 their enclosed Memorandum of Law the arguments set forth in the Memorandum of Law in Support
17 of the Joint Motion (the “Joint Brief”).

STATEMENT OF ISSUE TO BE DECIDED

Whether Plaintiffs' Complaint should be dismissed as to the Six Banks, because the Complaint does not adequately allege facts that would establish participation in the alleged conspiracy by any of the Six Banks.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS
BY THE SIX BANK DEFENDANTS**

Defendants Barclays Bank Delaware, Capital One Financial Corporation¹, Citibank, N.A. for itself, and as successor in interest to Citibank (South Dakota), N.A., PNC Bank, National Association, USAA Savings Bank and Wells Fargo Bank, N.A. (collectively, the “Six Banks”) join Defendants’ Joint Motion to Dismiss Plaintiffs’ Complaint and Memorandum of Law in Support thereof (“Joint Motion and Brief”). While Plaintiffs fail to allege sufficient facts to plausibly suggest a conspiracy among any of the Defendants, the Complaint is particularly lacking in any factual allegations involving the Six Banks.

Central to Plaintiffs’ claims is Defendant EMVCo, which according to the Complaint, is “the organization [that] serves as a means through which defendants here have been able to effectuate their conspiracy.” Compl. ¶ 20. Defendants Visa, MasterCard, JCB, Discover, and American Express are alleged jointly to own EMVCo. Compl. ¶¶ 6-9 & 21. Certain other Defendants are alleged to have been “Business Associates” or “Technical Associates.” *Id.*, ¶¶ 10, 13, and 18. “Owning” or being an “associate” of a company does not support a claim of conspiracy, as explained in the Joint Motion and Brief. But the Six Banks are not even alleged to have any involvement in EMVCo at all. Plaintiffs do not allege that the Six Banks are owners of EMVCo., have any official or unofficial role of any kind at EMVCo., or even that the Six Banks have had any communications with EMVCo. Indeed, there are no *factual* allegations about anything done by any of the Six Banks, much less pleaded *facts* plausibly suggesting their participation in some conspiracy relating to the “liability shift” allegedly effectuated through EMVCo.

The only allegations that even attempt to address the involvement of the Six Banks are that the network Defendants “and the issuing banks” decided to “change the system for handling chargebacks,” Compl., ¶ 74², and “decreed” that the liability shift would take effect in October 2015.

¹ Capital One Financial Corporation, the entity named in the Complaint, is a holding company and not the appropriate defendant here. Capital One Bank (USA), N.A. issues credit cards and should be substituted for Capital One Financial Corporation. Capital One’s counsel will discuss this with Plaintiffs’ counsel.

² “74. But the Networks decided that on October 1, 2015 – by fiat of Visa, MasterCard, American Express and the issuing banks, and without any opportunity for merchants like plaintiffs and the Class members to object or to opt out – the system for handling chargebacks for card present transactions would change dramatically.” *Id.*

1 Id., ¶ 75³. Plaintiffs nowhere identify any one of the Six Banks as having decided or decreed
 2 anything, or as having communications with any other Defendant about the liability shift or any
 3 other topic. In sum, Plaintiffs’ allegations amount to no more than conclusory, unsupported
 4 allegations that the Six Banks conspired with the other Defendants. As the Joint Motion and Brief
 5 makes clear, ample authority in this Circuit compels the conclusion that Plaintiffs have not plausibly
 6 alleged any case against the Six Banks.

7 The only mention by name of each of the Six Banks in the entire Complaint is a single
 8 paragraph as to each in the “PARTIES” section of the Complaint. These background allegations
 9 regarding the Six Banks are nearly identical⁴ and state only the uncontroversial and non-actionable
 10 facts that each bank issues credit cards in California and elsewhere; maintains consumer lines of
 11 credit associated with credit cards issued to consumers and businesses; that cardholder transactions
 12 are processed by the payment card networks; and that the Six Banks are “members” of Visa and
 13 MasterCard. Compl., ¶¶ 11, 12, 14-17, & 19.

14 Plaintiffs’ assertions that each of the Six Banks is a “member of both Visa and MasterCard”
 15 are meaningless for conspiracy purposes. Simply being a “member” of Visa and MasterCard does
 16 not render any Defendant liable for any alleged antitrust violation committed by Visa or MasterCard.
 17 Indeed, the Court of Appeals for the Ninth Circuit has recognized that “membership in an
 18 association does not render an association’s members automatically liable for antitrust violations
 19 committed by the association.” *Kendall v. Visa USA, Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008).

20 Nor do Plaintiffs’ allegations that “the member banks continue to exercise control over Visa
 21 and MasterCard” despite having “divested their ownership in Visa and MasterCard through an IPO,”
 22 suffice to plausibly plead participation by the Six Banks in the alleged conspiracy. Compl., ¶ 24.
 23 Not only is the assertion of “control” itself entirely conclusory, but also there are no facts pleaded –

24 ³ “75. In what defendants truthfully enough dubbed a “Liability Shift,” the issuing banks and the Networks decreed that,
 25 as of that October 1, 2015, liability for billions of dollars of card present chargebacks would shift from the issuing banks
 26 to the merchants, unless the merchants could satisfy certain conditions – conditions, it would turn out, which were
 impossible for the Class members to meet and which the Networks, the Issuing Banks and EMVCo knew were
 impossible to meet.” *Id.*

27 ⁴ As to five of the Six Banks, Plaintiffs simply changed the bank names in an otherwise form allegation. This is clear
 28 from ¶ 17 of the Complaint, in which Plaintiffs apparently missed changing “PNC” to “USAA.”

1 none – regarding any of the Six Banks (or any other Defendant bank for that matter) (i) having
 2 actually exercised any “control” with respect to either Visa’s or MasterCard’s respective liability
 3 shift decisions, *and* (ii) having done so in collusion with other Defendants.

4 As this Court has held many times, Plaintiffs must, in order to avoid dismissal of conspiracy
 5 claims, allege facts sufficient to show that each defendant, including each of the Six Banks, in their
 6 individual capacities, consciously decided to join in an anticompetitive conspiracy. *See, e.g.,*
 7 *Fenerjian v. Nongshim Co., Ltd*, 72 F. Supp. 3d 1058, 1072 (N.D. Cal. 2014)(“[t]o establish that a
 8 defendant is a member of a conspiracy, a plaintiff must ‘include allegations specific to each
 9 defendant alleging that defendant’s role in the alleged conspiracy, and must make allegations that
 10 plausibly suggest that each Defendant participated in the conspiracy’”) (quoting *In re Optical Disk*
 11 *Drive Antitrust Litig.*, Nos. 3:10-md-2143-RS, 3:13-cv-04991-RS, 2014 WL 3378336, at *4 (N.D.
 12 Cal. July 10, 2014)); *see also In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109,
 13 1117 (N.D. Cal. 2008) (plaintiffs “must allege that each individual defendant joined the conspiracy
 14 and played some role in it because, at the heart of an antitrust conspiracy is an agreement and a
 15 conscious decision by each defendant to join it”). Plaintiffs have utterly failed to allege specific
 16 facts about participation in the alleged conspiracy by any of the Six Banks.

17 For these reasons, in addition to those set forth in the Joint Motion and Brief, Plaintiffs’
 18 claims against the Six Banks should be dismissed.

19
 20 Respectfully submitted,

21 Dated: April 18, 2016

REED SMITH LLP

22 By: /s/ Daniel I. Booker

23 Daniel I. Booker (admitted *pro hac vice*)

24 dbooker@reedsmith.com

Michelle A. Mantine (admitted *pro hac vice*)

25 mmantine@reedsmith.com

Conor M. Shaffer (admitted *pro hac vice*)

26 cshaffer@reedsmith.com

27 225 Fifth Avenue

Pittsburg, PA 15222

28 Telephone: 412.288.3131

- 3 -

Facsimile: 412.288.3063

Attorneys for Defendant
PNC BANK, NATIONAL ASSOCIATION

Dated: April 18, 2016

SHEARMAN & STERLING LLP

By: /s/ James Tallon

James Tallon
599 Lexington Avenue
New York, New York 10022
Telephone: (212) 848-4000
Facsimile: (646) 848-4650
Email: jtallon@shearman.com

Patrick D. Robbins
Mikael A. Abye
Four Embarcadero Center, Suite 3800
San Francisco, California 94111-5994
Telephone: (415) 616-1100
Facsimile: (415) 616-1199

Attorneys for Defendant
BARCLAYS BANK DELAWARE

Dated: April 18, 2016

HUNTON & WILLIAMS LLP

By: /s/ D. Bruce Hoffman

Susan S. Joo (State Bar No. 260369)
Hunton & Williams LLP
575 Market Street, Suite 3700
San Francisco, CA 94105
Telephone: 415.975.3700
Facsimile: 415.975.3701
sjoo@hunton.com

D. Bruce Hoffman (DC Bar No. 495385) (admitted
pro hac vice)
Ryan Shores (DC Bar No. 500031)
(admitted *pro hac vice*)
Leslie Kostyshak (DC Bar No. 1005462) (admitted
pro hac vice)
Hunton & Williams LLP
2200 Pennsylvania Ave. NW
Washington, DC 20037

1 Telephone: 202.955.1500

2 Facsimile: 202.778.2201

3 bhoffman@hunton.com

4 rshores@hunton.com

5 lkostyshak@hunton.com

6 Attorneys for Defendant

7 CAPITAL ONE FINANCIAL CORPORATION

8 Dated: April 18, 2016

9 SIDLEY AUSTIN LLP

10 By: /s/ Benjamin R. Nagin

11 Peter K. Huston (SBN 150058)

12 555 California Street, Suite 2000

13 San Francisco, CA 94104

14 Telephone: 415.772.1200

15 Facsimile: 415.772.7400

16 Email: phuston@sidley.com

17 David Graham (*admitted pro hac vice*)

18 dgraham@sidley.com

19 SIDLEY AUSTIN LLP

20 One South Dearborn

21 Chicago, IL 60603

22 Telephone: 312 853-7000

23 Facsimile: 312 853-7036

24 Benjamin R. Nagin (*admitted pro hac vice*)

25 Melissa Colón-Bosolet (*admitted pro hac vice*)

26 bnagin@sidley.com

27 mcolon-bosolet@sidley.com

28 SIDLEY AUSTIN LLP

787 Seventh Avenue

New York, New York 10019

Telephone: 212 839-5300

Facsimile: 212 839-5599

Attorneys for Defendant

CITIBANK, N.A. for itself and as successor in

interest to CITIBANK (SOUTH DAKOTA), N.A.

Dated: April 18, 2016

BARNES & THORNBURG LLP

By: /s/ Bradley R. Love

Bradley R. Love

Kendall Millard

11 South Meridian Street

Indianapolis, IN 46204-3535

Telephone: 317.236.1313
Facsimile: 317.231.7433
Email: blove@btlaw.com
Email: kendall.millard@btlaw.com

Attorneys for Defendant
USAA SAVINGS BANK

Dated: April 18, 2016

MCGUIREWOODS LLP

By: /s/ David C. Powell

David C. Powell (CA SBN 129781)
dpowell@mcguirewoods.com
505 Sansome Street, Suite 700
San Francisco, CA 94111
Telephone: 415.844.1970
Facsimile: 415.844.9922

Howard Feller (admitted *pro hac vice*)
J. Brent Justus (admitted *pro hac vice*)
Gateway Plaza
800 East Canal Street
Richmond, VA 23219

Attorneys for Defendant
WELLS FARGO BANK, N.A

ATTESTATION

I, Daniel I. Booker, am the ECF user whose ID and password are being used to file the above NOTICE OF MOTION, MOTION OF DEFENDANTS BARCLAYS BANK DELAWARE, CAPITAL ONE FINANCIAL CORPORATION, CITIBANK (SOUTH DAKOTA), N.A., CITIBANK, N.A., PNC BANK, NATIONAL ASSOCIATION, USAA SAVINGS BANK AND WELLS FARGO BANK, N.A. TO DISMISS PLAINTIFFS' COMPLAINT, AND MEMORANDUM OF LAW IN SUPPORT. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that each signing counsel above has concurred in this filing.

/s/ Daniel I. Booker